MESSRS HISHAM, SOBRI & KADIR; ADVOCATES & SOLICITORS *a*

v.

KEDAH UTARA DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-428-86] *b*
16 MARCH 1988

CONTEMPT OF COURT: *Proceedings - Breach of undertaking - Whether undertaking voluntary - Service of order - Notification of consequence of breach of undertaking - Capacity of undischarged bankrupt to give undertaking - Whether there was wilful default.*

c

This was an application for contempt against three directors of the first defendant company for breach of undertaking. One of the directors was an undischarged bankrupt. The first defendant was a client of the plaintiff, a firm of lawyers, and the second defendant was a legal assistant in the firm. The first defendant had purchased a piece of land at a sale held pursuant to an order of Court. It was a condition of the sale that the first defendant furnish a banker's guarantee to the administrators of the estate of which included the said land. The *d* second defendant gave an undertaking to the said administrators to furnish the banker's guarantee within 7 days upon registration of the transfer in reliance upon a promise by the first defendant. The first defendant failed to deliver a banker's guarantee and the said administrators filed a suit against the plaintiff for delivery of the Bankers' Guarantee. Consequently, the plaintiffs had in turn instituted this suit against the company for an order for specific performance requiring the company to furnish the Banker's Guarantee and damages *e* in lieu or in addition thereto and as against the 2nd defendant, damages. On 10 December 1986 the plaintiffs had obtained an *ex parte* interlocutory mandatory injunction against the company.

In an application by the company to set aside the injunction and, consequent thereon, a consent order was entered whereby *inter alia* the said director of the first defendant agreed to deliver a banker's guarantee to the plaintiff for transmission to the administrators. There *f* was a personal undertaking by the said directors to comply with the order.

The issues were whether there was a wilful breach of the undertaking; whether contempt proceedings could be instituted against an undischarged bankrupt; whether the undertaking was given voluntary; whether the directors had been informed of the consequences of not complying with the undertaking; and whether the consent order had been duly served. *g*

Held:

[1] The director who was an undischarged bankrupt did not require leave of Court under s. 38(1) Bankruptcy Act 1967 as the contempt of Court was an offence of a criminal character since the liberty of the alleged contemnor is at stake. As an undischarged bankrupt, the director did not have a fair opportunity nor the capacity to give an undertaking as a director of the company as he could not take part in the management of the company as provided *h* by s. 125(1) Companies Act 1965. Therefore, the contempt proceedings against him were unsustainable.

[2] The undertaking by the directors was given after the consent order was entered and the circumstances under which it was given indicate that it was not given voluntarily.

i

[3] Since the consent order bearing the penal endorsement duly or at all as prescribed by O. 45 r. 7(4) and Form 87 Appendix A Rules of the High Court 1980 was not served on the company nor the said directors, the contemnors, the application for committal was fatally flawed. Service could not be dispensed with even though they were present when the consent order was made.

[4] There was no evidence to show that the directors had been informed that they would be punished for contempt if they breached the undertaking.

[5] It was implied in O. 45 r. 5 Rules of the High Court 1980 that the breach of undertaking had to be wilful for an order of contempt to be made. The directors had given uncontradicted explanation to show that they made efforts to obtain the bank guarantee but had failed. Thus, there was no wilful contempt of Court.

[Application for committal dismissed with costs.]

Cases referred to:
Gordon v. Gordon [1946] 1 All ER 247
McIlraith v. Grady [1968] 1 QB 468
London & Birmingham Railway Co. v. Grand Junction Canal Co. [1835] 1 Ry & Can Cas 224
Dent v. Dent & Hall [1962] 1 All ER 746
Ronson Products Ltd. v. Ronson Furniture Ltd. [1966] 2 All ER 381
Re Tuck [1906] 1 Ch 696
Century Insurance Co. v. Larkin [1910] IR 91
Haydon v. Haydon [1911] 2 KB 191
Arumugam v. Suppiah Chettiar [1935] MLJ 4
The Venda [1960] MLJ 283
Dawkins v. Prince Edward Saxe Weimar [1875-76] 1 QBD 499
Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] CLJ (Rep) 45
Fairclough & Sons v. Manchester Ship Canal Co. [1897] 41 SJ 225
Heaton's Transport v. TGWU Ship Canal Co. [1973] AC 15
Re Bramblevalle Ltd. [1969] 3 All ER 1062

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1) 24(4)
Companies Act 1965, ss. 4, 125(1)
Rules of the High Court 1980, O. 45 r. 5, 7(4)

Other source referred to:
Law of Contempt, Arlidge and Eady, 1982, p. 270, para. 5 - 18

For the plaintiff - Foo Say Keow (Charles Rajah with him);M/s. Hisham, Sobri & Kadir
For the defendants - S.P. Annamalai; M/s. Johari, Goh & Associates

JUDGMENT

Edgar Joseph Jr J:

This is a plaintiffs' application, by notice of motion, for an order that Lim Chau Seng, Ooi Liew See (f) and Mohd. Fauzi @ Mohd. Naim bin Haji Marzuki, described as directors of Kedah Utara Development Sdn. Bhd., be committed to prison for their alleged contempt of Court by having respectively breached their undertaking given to the Court on 16 February 1987 ("the Undertaking") in the circumstances hereinafter appearing.

At the outset, Mr. Annamalai as Counsel for Madam Ooi Liew See, asked the Court for leave to also act as Counsel for her husband Lim Chau Seng, an undischarged bankrupt, he having been so adjudged in the High Court at Kuala Lumpur on 22 September 1986.

Mr. Annamalai referred to s. 8 of the Bankruptcy Act 1967 and mentioned that he had written a letter dated 18 February 1988 addressed to the Assistant Official Assignee, Kedah and Perlis, asking for permission to represent the bankrupt but the letter evoked no response.

With respect, I was of the opinion that s. 8(1) was inapplicable since it merely deals with the position of a creditor whose debt is provable in bankruptcy, who seeks to commence any action or legal proceedings against the bankrupt debtor, and who may not do so except with the leave of the Court. The applicants here were, of course, not creditors of the bankrupt.

Nor, for that matter, could s. 38(1) of the Bankruptcy Act referred to by Mr. Mohan Lal, the Assistant Official Assignee, Penang, have any application since that provision merely prevents an undischarged bankrupt from maintaining any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

When it is remembered that contempt of Court is an offence of a criminal character for which the offender if found guilty may be committed to prison, it seems clear to me that the bankrupt is entitled to be represented by a legal practitioner of his choice and no leave of Court is necessary.

I now turn to consider the application before me.

In order to understand the issues which arise on this application it is necessary to set out, by way of preliminary, the history of the proceedings which led up to them.

The plaintiffs are Advocates and Solicitors practising under the name or style of Hisham, Sobri and Kadir, with offices at Kuala Lumpur and a branch office at Alor Star.

Kedah Utara Development Sendirian Berhad, an incorporated company, being the first defendant ("the Company"), were at all material times, clients of the plaintiffs with dealings at the branch office aforesaid.

Yaacob bin Othman, an Advocate and Solicitor, the second defendant, was at all material times, employed by the plaintiffs as a legal assistant at their branch office aforesaid.

The Company was the purchaser of the land comprised in Surat Putus 20740 Lot 2414 Mukim and district of Kota Setar ("the land"), being the property of the estate of Tunku Mohd Jewa, ("the Estate") at a sale by public tender, held pursuant to an order of the High Court, Alor Star, made on 27 August 1984 ("the Order of Court") for the sum of RM1,039,228 on terms that the company do:

(a) pay the sum of RM50,000 towards and to account of the balance of the tender amount to the Administrators of the Estate.

(b) pay to the Solicitors of the Administrators of the Estate, the sum of RM450,000 upon the presentation for registration of the relevant document of transfer ("the Transfer"):

(c) deposit with the Solicitors of the Administrators of the Estate, upon presentation of the Transfer, the sum of RM435,305.20, being the full and final balance of the tender amount, in the form of a continuing and irrevocable Bankers Guarantee made in favour of the Administrators ("the Bankers' Guarantee") and payable upon the Administrators' delivery of complete vacant possession of the land to the Company and upon confirmation of the same by the Administrators' Solicitors.

In furtherance of the sale and purchase transaction, the Company applied for and were granted overdraft facilities and/or other banking facilities and accommodation by Bank Bumiputra Malaysia Bhd. ("the Bank").

Accordingly, the Bank retained the plaintiffs to prepare and perfect its security being a legal charge over the land ("the Charge") to enable the overdraft facilities to be granted to the company.

The second defendant, as Legal Assistant to the plaintiffs, had charge of this transaction and acted upon the instructions of both the Bank and the Company.

In particular, the Bank's instructions were that it had agreed to advance on behalf of the company, to account of the overdraft facilities aforesaid, the sum of RM450,000 hereinbefore mentioned, but only upon presentation of the Charge - valid and registrable - over the land in its favour.

According to the plaintiffs, in reliance upon a promise given by the Company to furnish to the plaintiffs the Bankers' Guarantee, the second defendant, as Legal Assistant to the plaintiffs, gave to the Solicitors for the Administrators of the Estate, the undertaking to forward the Bankers' Guarantee within seven days of the registration of the transfer of the land. In so doing - according to the plaintiffs - the second defendant believed (though perhaps negligently) that the Company would, in fulfilment of its obligation under the order of Court, deliver the Bankers' Guarantee to the plaintiffs, on or before the presentation of the transfer of the land and thus enable the transaction to be completed.

In any event, the plaintiffs say that the Company owed a duty to the plaintiffs to furnish to them the Bankers' Guarantee to enable the plaintiffs to carry out the undertaking given by them to the Bank, at the behest of the Company express or implied, and wholly for the latters' benefit.

But then - so it was alleged - in breach of their promise, the order of Court and their duty aforesaid, the Company failed to furnish to the plaintiffs the Bankers' Guarantee.

In the upshot, the Administrators of the Estate instituted a suit against the plaintiffs for the delivery of the Bankers' Guarantee, being Penang High Court Civil Suit 280/86 and, in consequence, the plaintiffs had in turn instituted the suit herein claiming as against the Company an order for specific performance requiring the company to furnish the Bankers' Guarantee and damages in lieu of or in addition thereto and, as against the Second defendant, damages.

It was against the background of the above facts that the plaintiffs had on 10 December 1986 obtained an *ex parte* interlocutory mandatory injunction against the Company ("the Injunction") in the following terms:

> That the Company, their servants and/or agents, do forthwith deliver to the plaintiffs a continuing and irrevocable Bankers' Guarantee in favour of the Administrators for the sum of RM435,305.20 and payable upon the Administrators delivering complete vacant possession of all that piece of land known and described as Surat Putus 20740 , Lot 2414 Mukim and District of Kota Setar, Kedah to Kedah Utara Development Sdn. Bhd. and upon confirmation of the same by Messrs Tan, Yu & Co., solicitors for the Administrators.

The company then applied by summons in chambers to set aside the Injunction and, consequent thereon, a consent order ("the Consent Order") was duly entered on 16 February 1987 which, omitting formal and introductory parts, was as follows:

... **By Consent it is Ordered** that the Order of Court dated 10 December 1986 be and is hereby varied **And by Consent it is Ordered** that the First defendant, Kedah Utara Development Sdn. Bhd. by their agents or servants, Directors and/or officers do deliver on or before 30 September 1987 to the plaintiff a continuing and irrevocable Bankers' Guarantee in favour of Tunku Ismail bin Tunku Md. Jewa and Tunku Arfah bt. T. Md. Jewa, Administrators of the Estate of Tunku Md. Jewa Haji Ibni Almarhum Sultan Abdul Hamid, Deceased (hereinafter referred to as "the Administrators") for the sum of RM435,305.20 (Ringgit Four Hundred and Thirty-Five Thousand Three Hundred and Five and Cents Twenty Only) and payable upon the Administrators delivering complete vacant possession of all that piece of land known and described as Surat Putus 20740 Lot 2414 Mukim and District of Kota Setar Kedah to Kedah Utara Development Sdn. Bhd. and upon confirmation of the same by M/s Tan Yu & Co., solicitors for the said Administrators and the First defendant in the sale and purchase transaction ...

It was common ground that as soon as I had recorded the Consent Order on 16 February 1987, in Chambers, the alleged contemnors walked into Chambers, at the behest of Mr. Charles Rajah, the Counsel for the plaintiffs, who had then insisted, as an after-thought - so I was told during the argument - that they give a personal undertaking to comply with the Consent Order, which it is agreed they did.

It is convenient, if at this stage, I reproduce the note I had made of those proceedings. It reads as follows:

Enclosure 13.

Annamalai (Goh with him) for D1/Applts. Charles Rajah for plaintiff/respondent.

Court: I enter Consent Order in terms of draft "A".

sgd. E.J.

Annamalai: The Directors and/or officers of D1 namely, Lim Chau Seng, Mohd Fauzi @ Mohd Naim bin Haji Mazuki and Madam Ooi Liew See, do personally and severally undertake to comply with the consent order made herein.

sgd. E.J.

However, during those proceedings, not a word was uttered to the Court about the fact that Lim Chau Seng had been adjudicated a bankrupt by the High Court, Kuala Lumpur, on 22 September 1986, although this fact was well known to the Counsel aforesaid, at the latest, on 21 January 1987, as appears from the judgment of my brother Dzaiddin in Penang High Court, Originating Motion No. 32-64-86 (reported [1987] 2 MLJ 387).

In that originating motion, my brother Dzaiddin had dismissed certain preliminary objections raised by Mr. Annamalai for the bankrupt Lim Chau Seng in proceedings brought by Hisham, Sobri & Kadir, Advocates and Solicitors who, as I have said, are the plaintiffs herein, seeking an order of committal to prison against Lim Chau Seng and Ooi Liew See for their failure to comply with the Injunction whereby they were required to forthwith deliver to the plaintiffs the Bankers' Guarantee.

I should, I think, at this stage, pause to explain why, at first sight, it might seem that there were concurrent committal proceedings both before my brother Dzaiddin and me involving the same parties and the same subject matter.

The records of the Court show that Civil Suit No. 428/86, which is the suit out of which the present application arises, was filed in my brother Dzaiddin's Court ("Court 2") and the application for the injunction then taken out by the plaintiffs. However, my brother Dzaiddin was not available to hear the application and it was for that reason that I heard and granted it on 10 December 1986.

So, when the plaintiffs considered that there had been a breach of the Injunction they applied and obtained from my brother Dzaiddin, on 5 January 1987, an order for leave to commence contempt proceedings.

On the other hand, the company applied, on 16 January 1987, by summons in chambers, to set aside the Injunction.

The plaintiffs' reaction to this was to apply by Originating Motion No. 61/86, on 20 January 1987, for an order of committal against Lim Chau Seng and Ooi Liew See. At the hearing, the preliminary objections to which I have referred were raised before my brother Dzaiddin who in a considered judgment given on 16 February 1987, dismissed the same.

However, hearing of the application on the merits did not proceed because the proceedings were discontinued; apparently because earlier the same day, I had recorded the Consent Order and the undertaking.

As events turned out, the plaintiffs considered that there had been a wilful breach of the Consent Order and the undertaking and hence the present application before me.

I shall now proceed to consider the various submissions made by Counsel.

The first point taken by Mr. Annamalai on behalf of bankrupt, Lim Chau Seng, is that the latter was not, at the time the undertaking was given, in law, a director of the company, he being disqualified from acting as such under s. 125(1) of the Companies Act 1965, which provides:

> Every person who being an undischarged bankrupt acts as Director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act.

Mr. Foo, in reply, contended that when the undertaking was given neither the plaintiffs nor their Solicitors had any means of knowing that Lim Chau Seng had ceased **to act** as a director. He added that the undertaking if enforced would not touch the personal assets of the bankrupt and so s. 24(4) of Bankrupt Act 1967, which provides that "When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee" had no application.

Now, it is well settled law that contempt of Court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalised unless he has both **a fair opportunity to comply with the law and the capacity to do so**. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice.

The very terms of the undertaking make it clear that it was given by the individuals concerned in their capacity as "Directors and/or officers of the Company". But, s. 125(1) of the Companies Act 1965, prevents an undischarged bankrupt from acting as Director or directly or indirectly taking part in or being concerned in the management of any corporation except with the leave of the Court under pain of the penalties provided therein. The definition of "officer" in relation to a corporation in s. 4 of the Companies Act makes it clear that such a person must directly or indirectly take part or be concerned in the management of a corporation. Certainly, the undertaking by Lim Chau Seng to comply with the Consent Order in the present case would entail directly or indirectly taking part in or being concerned in the management of the company.

Accordingly, the conclusion at which I have arrived, so far as this point is concerned, is that at the material time, Lim Chau Seng did not have a fair opportunity nor the capacity to give the undertaking and, on this ground alone, the contempt proceedings against him are unsustainable.

The second point taken by Mr. Annamalai was that although the application for committal was based on the alleged breach of an undertaking, the real point in issue was whether there had been a wilful breach of the Consent Order by the contemnors. That being the case, he argued there were two pre-requisites to be complied with. In the first place, the undertaking had to be embodied in the Consent Order and, in the second place, the Consent Order had to be personally served on the alleged contemnors. As neither of these requirements had been fulfilled, it was submitted that the Application for committal was bound to fail.

On the other hand, Mr. Foo submitted that an infringement of an undertaking may be made the subject of an application to punish for contempt and it matters not that the undertaking has not been embodied in an order.

In my approach to the questions for decision regarding this part of the case, I have kept in the forefront of my mind the basic proposition that in proceedings for committal a man's liberty is at stake and so every requirement of the law must be strictly complied with. I need no more than refer to two authorities in support of this proposition:

In *Gordon v. Gordon* [1946] 1 All ER 247, Lord Greene MR said this:

> Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom. (at p 250F)
>
> It becomes more manifestly unfortunate - I will not say absurd - when one finds that strict compliance with the rules as to service is required even in a case where the person against whom the order is made is perfectly well aware of it, is perhaps in Court when it is made, and deliberately sets himself to flout it. (at p 251G)
>
> In the result this undoubtedly contumacious person succeeds in retaining his liberty, as he is entitled to do, owing to the fact that the order was not properly served (at p 253G)

In *McIlraith v. Grady* [1968] 1 QB 468, 477 Lord Denning MR said this:

> The second appeal is as to the committal order. Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with: see *Gordon v. Gordon*, by Lord Greene MR

Now, it is generally presumed that those who volunteer undertakings know what they are doing and this may well be the reason why, for purposes of contempt proceedings, it matters not whether the undertaking has been embodied in an order.

But, was the undertaking in this case **volunteered** even though it may well have been **voluntary**? This brings me, once again, to the particular circumstances of this case.

I have already noted and would now stress that it was just **after** the Consent Order was entered that it occurred to Mr. Rajah for the applicants - as an afterthought - that perhaps, the Consent Order could be reinforced by obtaining an undertaking from the alleged contemnors and he did in fact insist upon this. Accordingly, both Mr. Annamalai and Mr. Goh Lim Eam, withdrew from my chambers and, no doubt, conferred with the alleged

contemnors who were waiting just outside and, having obtained their assent to give the undertaking, re-appeared in chambers, in a matter of two or three minutes, this time accompanied by the alleged contemnors. The alleged contemnors said something to Mr. Annamalai who then spoke on their behalf giving the undertaking. Nothing turns on Mr. Annamalai's authority to speak on their behalf and, I shall therefore assume, in favour of the applicants, that he was merely conveying to the Court what the alleged contemnors had told him.

Be that as it may, it is clear beyond argument that the undertaking was not one on the faith of which the Consent Order had been recorded; had it been such an undertaking it would have had the same force as an injunction, a breach of which would be misconduct amounting to contempt: *London & Birmingham Railway Co. v. Grand Junction Canal Co.* [1835] 1 Ry & Can Cas 224; *Dent v. Dent & Hall* [1962] 1 All ER 746. Indeed, the undertaking was wholly superfluous and therefore unnecessary, for when, as here, the Consent Order was one requiring the Company which was a body corporate **to do a positive act** as opposed to prohibiting an act, and it had failed to comply with the same, on that alone, enforcement proceedings could have been brought against a Director or other officer of the Company, provided there was proof of due service on the Director or officer concerned of the Consent Order bearing the penal endorsement in the terms prescribed by O. 45 r. 7(4) and Form 87 Appendix A. (See *Ronson Products Ltd. v. Ronson Furniture Ltd.* [1966] 2 All ER 381).

I should add that in such a situation, that is to say, where there has been an undertaking or order to do a positive act, the mere fact that the directors or officers were present when the order was made and so must have had notice of it is not sufficient to dispense with service (see *Re Tuck* [1906] 1 Ch 696; *Century Insurance Co. v. Larkin* [1910] IR 91 and *Haydon v. Haydon* [1911] 2 KB 191) unless there is also the clearest proof that service is being evaded.

I must now, once again, direct my attention to the particular circumstances of this case.

I note, in passing only, that although the Consent Order was directed against the Company the penal endorsement in purported compliance with O. 45 r. 7(4) Rules of the High Court 1980, was addressed to the alleged contemnors and was in the following terms:

> If you Lim Chau Seng of No. 1462, Ground Floor, Taman Sultan Badlishah, Alor Setar, Kedah, Ooi Liew See also of No. 1462, Ground Floor, Taman Sultan Badlishah, Alor Setar, Kedah and Mohd. Fauzi @ Mohd. Naim bin Haji Marzuki of Istana Anak Bukit, Alor Setar, Kedah Directors of the 1st defendant Kedah Utara Development Sdn. Bhd. neglect to obey this order, you will be liable to process of execution for the purpose of compelling you to obey same.

Manifestly, the penal endorsement had to be, but was not in accordance with the form prescribed by O. 45 r. 7(4) and Form 87 Appendix A; that is to say, as follows:

> If you Kedah Utara Development Sdn. Bhd. neglect to obey this Order by the time therein limited you Lim Chau Seng, Ooi Liew See & Mohd. Fauzi @ Mohd. Naim bin Haji Marzuki Directors or officers of the Kedah Utara Development Sdn. Bhd. will be liable to process of execution for the purpose of compelling the said Kedah Utara Development Sdn. Bhd. to obey the same.

But, the question of critical substance is this: should the alleged contemnors be deprived of their right to be served with the Consent Order bearing the prescribed penal endorsement simply because of an undertaking which was never volunteered but was instead virtually demanded from them, on the spot, as it were, by Counsel for the applicants, with hardly anytime to reflect on their position, and after the Consent Order was recorded? I have no hesitation in answering this question in the negative.

Since it was common ground that neither the Company nor the alleged contemnors were served with the Consent Order bearing the appropriate penal endorsement, duly or at all, as required under O. 45 r. 7(4), the application for committal was fatally flawed on this ground as well. (See, for example, *Arumugam v. Suppiah Chettiar* [1935] MLJ 4; *The Venda* [1960] MLJ 283).

There is yet another ground for dismissing the application though this was not raised before me.

Even where undertakings are volunteered, whether by parties or not, it is important that those who do so should have explained to them the solemn duty thereby assumed and, in particular, that punishment for contempt may be imposed in the event of a breach: see p. 270 para. 5 - 18 of the *Law of Contempt* by Arlidge and Eady [1982]. I should think that in a case such as this, where the undertaking was **not** volunteered, and the persons giving it (one of whom was an undischarged bankrupt) were called into Chambers with, practically speaking, no notice worth mentioning and with hardly any time to reflect on the serious liability they might be incurring, the need for such an explanation was even more important.

There is nothing in the papers before me to show that the alleged contemnors received that explanation and indeed the affidavit of Ooi Liew See, one of them, confirms that suspicion.

Finally, the alleged contemnors had in a letter dated 19 September 1987 (ex. 02 to En. 37), addressed to the Solicitors for the Company, with copies to the plaintiffs and the Solicitors for the Administrators, explained why they had failed to comply with the Consent Order. The letter reads as follows:

> Dear Sirs,
>
> **Ref: Pg.High Ct. Suit No. 23-428-86, Bank Guarantee RM435,305.20**
>
> Your letter dated 17 September 1987 refers.
>
> We have not responded to your several letters of reminders because we are waiting for release of funds either from His Highness The Sultan of Kedah OR the Bank Negara Malaysia Bhd., then to arrange for the Bank Guarantee to forward to you.
>
> We have had proposed to sell to His Highness, Sultan of Kedah 14 units of houses worth RM2,582,123.90 and parts of this amount will be applied to obtain the said Bank Guarantee. His Highness had principally agreed to the sale and His Highness has yet to sign the sale and purchase agreement, thus the release of the sale proceeds (enclosed the letter.)
>
> We have also been approached by Bank Negara Malaysia, Alor Setar Branch for an offer to sell to the bank 3 units of houses for RM474,525. The board of the Bank Negara Malaysia Bhd. will decide the proposal of sale by end of this month (enclosed the letter of offer)
>
> During the period ended 30 September 1987 granted by the plaintiff, we tried very very hard to obtain funds by several means namely,
>
> i. The RM910,000 Bank facilities from Bank Pertanian Malaysia Bhd. This was rejected but appeal for reconsideration this coming Board meeting on 23 September 1987 (enclosed the letter).
>
> ii. Bank facilities for the another housing scheme developed on Lot 1775 Mukim dan Daerah Kota Setar. (This has been rejected and the project abandoned with loss of RM300,000 cash paid 2 years ago.) (enclosed the letter)
>
> We wish to state that we are still financially sound, provided we are able to liquidate our housing stock which we are doing now. It is a public knowledge that housing market is very bad and this is the main obstacle to our desire to obtain Bank Guarantee.

In view of our hard effort tried to obtain fund from the proposed sale and other Banking Facilities in order to arrange for said Bank Guarantee, and their respective final confirmation also fall by end of this month, we beg to appeal to plaintiff to grant us another 1 month's time to arrange for the said Bank Guarantee.

Thank you very much.

Yours faithfully,
sgd. Lim Chau Seng

sgd. Hj. Mohd. Naim bin Hj. Marzuki

sgd. Ooi Liew See

Furthermore, in her affidavit affirmed to on 11 February 1988 (En.37) the alleged contemnor, Ooi Liew See, had asserted that she had made all possible efforts to secure the Bankers' Guarantee but to no avail and, in support, has exhibited certain contemporary correspondence. Similarly, the alleged contemnor, Lim Chau Seng, has in his affidavit affirmed to on 29 February 1988 (En. 43) made similar assertions. There had been no affirmation in reply challenging or contradicting these assertions. The effect of such an omission is too well known to need restatement here. (See, for example, *Dawkins v. Prince Edward Saxe Weimar* [1875-76] 1 QBD 499, 501 followed in *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382, 385; [1986] CLJ (Rep) 45).

However, Mr. Foo drew my attention to the fact that when the alleged contemnor, Lim Chau Seng, had raised money by sale of certain houses built by the Company, he did not use it to obtain a Bankers' Guarantee but instead applied it for the purpose of completing the building project.

In reply, Mr. Annamalai submitted that the alleged contemnor had hardly any choice but to do as he had done since the money was not his but the company's.

There is authority for the view that an order for committal or the issue of a writ of sequestration is only appropriate where the contempt is wilful. (See *Fairclough & Sons v. Manchester Ship Canal Co.* [1897] 41 SJ 225). Indeed, the former Rules of the Supreme Court in England imposed such a requirement specifically. However, the present O. 45 r. 5 in England, which is in *pari materia* with the identically numbered rule in our Rules of the High Court, omits the word "wilful". Nevertheless, the word "wilful" must be taken to be silently implied and so the position remains unchanged despite the omission. (See *Heaton's Transport v. TGWU Ship Canal Co.* [1973] AC 15).

After careful consideration, I accept the uncontradicted explanation given by the alleged contemnors for failing to comply with the Consent Order as I find nothing improbable in it. There is thus raised, in their favour, more than a reasonable doubt, the benefit to which they are entitled: *Re Bramblevalle Ltd.* [1969] 3 All ER 1062. Accordingly, so far as may be necessary, I find as a fact that the contemnors had not committed any wilful contempt of Court.

In all the circumstances, I am thoroughly convinced that this application for committal should be, and is, hereby dismissed with costs.

Also found at [1988] 1 CLJ 627